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70-159

In the Supreme Court of the United States

OCTOBER TERM, 1970

RICHARD J. DEUTSCH and BERT WILLIAMS,

Petitioners,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The Petitioners, Richard J. Deutsch and Bert Williams, pray that a Writ of Certiorari be issued to review the decision of the United States Court of Appeals for the Seventh Circuit in the above case.

THE OPINION BELOW

The opinion of the Court of Appeals is printed as Appendix (A) hereto.

JURISDICTION

The judgment of the Court of Appeals was entered on January 13, 1971 (Appendix B). A Petition for Rehearing en banc was denied on March 23, 1971 (Appendix C).

On May 13, 1971, this Court (per Mr. Justice Thurgood Marshall) extended the time for filing this Petition to and including May 13, 1971 (Appendix D).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

1. Does the Sixth Amendment guarantee of a speedy trial (or the Fifth Amendment guarantee of due process) apply to cases where there is an inexcusable unreasonable delay between the time the government becomes aware of a crime and the person committing it and the actual time of his arrest and indictment?

2. Should the burden of proving the necessity for delay be upon the government where the arrest and indictment of a defendant are not accomplished until a few days prior to the running of the statute of limitations and where the defendant asserts by motion that the delay has impaired his ability to defend himself?

3. Where a motion to dismiss an indictment by reason of unreasonable governmental delay asserts by affidavit that the delay has resulted in defendants' inability to reconstruct complicated financial transactions which occurred from five to eight years prior to the first notice that they were to be prosecuted for those transactions, and that the delay had lulled defendants into forgetfulness, must the court at least grant a hearing on the issue of the extent to which the defendants are prejudiced by the delay and the reasons for the delay itself?

4. Can a reviewing court conclude from the trial record alone that the delay in prosecution did not prejudice defendants merely because of convincing evidence of guilt against those defendants, where defendants did not take the stand on their own behalf and offered no evidence which would indicate that they reconstructed or remembered the events of the case, and where the government's only witness suffered significantly from memory lapses?

5. Can the Statutes of Limitations be tolled by an act of a co-conspirator with respect to prosecution of two other co-conspirators by an independent act of the first co-conspirator not in furtherance of the alleged conspiracy and without the knowledge and consent (express or implied) of the other two conspirators?

CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT VI

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial. . . ."

STATEMENT OF THE CASE

Richard J. Deutsch and Bert Williams were indicted on July 25, 1968 for conspiring with Estley Maglott (here unindicted) to misapply funds of the National Bank of Hyde Park in violation of Title 18, U.S.C. Sec. 656. The indictment alleged that the conspiracy began March 1, 1961 and continued to the date of indictment through a series of loans which Maglott caused the bank to grant, the proceeds of which went to the benefit of the defendants instead of the purposes stated on the loan applications. The indictment further cited misapplication of bank funds, which were used towards the payment of other loans of defendants instead of the use applied for.

The last overt acts alleged in the indictment were alleged to have occurred on July 30, 1963 when Maglott caused a check in the amount of $2,375.00 to be issued in the name of John B. Spellers as payee and when on that date Maglott caused a credit in the amount of $2,250.00 to the checking account of defendants (Wildee Investment Co.).

Maglott was the sole government witness at the non-jury trial against defendants, the defendants did not testify in their own defense, and only Spellers testified on their behalf to the effect that neither defendant had knowledge of the July 30th transaction.

STATEMENT OF FACTS

The following is a capsule summary of the facts relevant to the questions raised by this petition:

Defendants Deutsch and Williams were indicted on July 25, 1968 for conspiring with Estley Maglott (here unindicted) to fraudulently misapply funds of the National Bank of Hyde Park, the last overt acts having allegedly occurred on July 30, 1963.

In all of the loans involved, which stretched over a period beginning in March, 1961 through July 30, 1963, Maglott, the then Vice President of the bank was the instigator and he engineered the transactions. The funds from these various loans were used for many varied purposes which cannot be easily summarized nor categorized.

In July of 1961 Maglott convinced Deutsch and Williams, who then enjoyed a good reputation at the bank, to purchase 31 second mortgages from the bank which Maglott had illegally taken into the bank's portfolio. To help them make this purchase, Maglott arranged a bank loan and another outside loan which were personally signed by defen-

dants, and Maglott set himself up as the collection agent for the 31 mortgages (App. 64-66, 106, 144). The proceeds from these 31 notes were to be placed by Maglott in an account set up in the Hyde Park Bank in the name of Wildee Investment Company, a partnership created by Deutsch and Williams to accomplish this transaction, and Maglott insisted in holding the Wildee checkbook so that the funds which went into that account could be used for nothing other than the repayment of the two loans created for this purchase. (App. 148-149). Maglott obtained groups of presigned blank checks on the account from the defendants for his convenience so that he could make the loan payments as they came due. (App. 149-150).

Loans were made to Deutsch and Williams in September, December of 1961 and February, April and June of 1962. (Govt. Exs. 5, 6, 7, 8 and 9) to cover payments due on the aforesaid outside loan. These loans were generally instigated by Maglott, made in the names of Deutsch and Williams companies as improvement loans on various properties and the proceeds were generally traced to repayments made upon the loan of the outside lender (App. 69-76).

After July of 1962 nothing further occurred with respect to Richard J. Deutsch, and the next proven activity concerns a series of automobile loans made to various people who knew nothing about the loans, beginning in April of 1963. Of $8,755.00 obtained by Maglott in this manner, $3,600.00 was used to reduce the Deutsch and Williams loans then delinquent. These auto loans were converted to cash through an exchange of checks with John Spellers, an employee of Bert Williams real estate management company. (App. 155-158).

On July 27, 1963, Maglott needed money for some outside purpose he could not recall, and wrote one of the

presigned checks out to cash in the amount of $2,200 (App. 154-155, 184-185). There is nothing in the record indicating knowledge of or consent to this check by defendants. Maglott learned the next day that this check overdrew the Wildee account, and, to cover the overdraft, on July 30, 1963 he made a phony auto loan to John Spellers and took Spellers' check back in return. Maglott then caused the Spellers check to be credited back to the Wildee account. There is no evidence indicating knowledge of this activity by defendants, and Spellers testified that they in fact had no knowledge of these events. (App. 202-203)

Shortly thereafter Maglott was called in by the Bank president inquiring of the Spellers loan of July 30, 1963; Maglott excused himself and hurriedly left town. He was arrested two years later in Miami, Florida. (App. 95-96, 101)

In September 1965 Maglott entered a plea of guilty to nine counts of bank fraud and embezzlement (App. 98), the ninth count of which charged him with misapplication in the sale of the 31 junior mortgages to Deutsch and Williams in July, 1961. (App. 100)

September 16, 1965 the Assistant United States Attorney spoke on Maglott's behalf at his sentencing and told the court of his past cooperation and promise of future help with respect to additional prosecutions. (App. 118)

On July 25, 1968 Deutsch and Williams were first charged with complicity in the Maglott bank fiasco, when the indictment at bar was returned.

After indictment defendants moved for dismissal by reason of the unreasonable delay and asked for a hearing. (App. 9) Accompanying said motion Defendant Deutsch filed an Affidavit setting forth defendants' inability to re-

construct the long forgotten events of the case both due to loss of records and because they were lulled into forgetfulness (App. 11-13). Defendants' motions were denied without hearing. (App. 25)

December 6, 1968, defendants' attorney filed a verified motion for continuance stating as follows: "Due to the inordinate amount of time and effort spent by the defense in attempting to refresh recollections and reconstruct events of over five, six and seven years ago, additional time is needed in order to complete defendants' efforts in the preparation of an adequate defense as is possible under the circumstances." (App. 26)

At the trial the only defense raised was the statute of limitations defense. Spellers was the only witness for the defense and neither defendant testified.

At the close of the government's case defendants renewed their pre-trial motion and added as grounds therefore the prejudice derived from the numerous memory lapses of the government's only witness, and again the motion and demand for hearings on delay was denied (App. 28-30).

Finally, defendants' motion for new trial (App. 39-58) again asserted the matter of delay and refusal of hearing. Defendants also asserted that the delay deprived them of their Constitutional right to confrontation and cross-examination since by the time of trial Maglott was only half a witness. Also, the defendants argued that the acts of Maglott on July 30, 1963 were not overt acts in furtherance of the proven conspiracy.

THE OPINION OF THE COURT OF APPEALS

Defendants appealed the judgments of conviction to the United States Court of Appeals for the Seventh Circuit and the Court held that the defendants failed to show that they were prejudiced by the delay and that therefore the government need not explain its reason for the delay. The Court additionally lumped all of the loan transactions into one conspiracy without explanation, found that there was ample evidence for finding the acts of July 30, 1963 as acts in furtherance of the conspiracy (again without analysis of the facts and without adequate explanation), and sustained the conviction.

REASONS FOR GRANTING THE WRIT

I.

There is Pressing Need for Defining the Right To a Speedy Trial In Situations of Unnecessary Delay Prior to Indictment.

The uncertain area, concerning the applicability of the constitutional guarantee of a speedy trial to situations of delay between the time the government becomes aware of potential prosecution and actual notice to the prospective defendants by way of arrest or indictment, is in urgent need of definition. This area is eloquently examined in the concurring opinion of Mr. Justice Brennan (joined by Mr. Justice Marshall) in the recent case of *Dickey* v. *Florida*, ... U.S. ....., 26 L. Ed. 2d 26, 90 S. Ct. 1564 (1970), and the conclusion of that opinion calls for answers to questions raised in the appeal at bar.

In the case at bar, although a request for hearing was denied by the trial judge, it is probable that the government knew or should have known of the involvement of defendants Deutsch and Williams with Estley Maglott at the National Bank of Hyde Park shortly after Maglott fled from Chicago in May of 1963. Upon Maglott's apprehension in 1965 he pleaded guilty to crimes committed by him while Vice President of that bank including one incident of misapplication which involved a transaction which was central to the case now at bar. In September of 1965, the government at Maglott's sentencing told the court of his cooperation and readiness to aid in the prosecution of those who were involved with him. It wasn't until July

25, 1968 that the government returned this indictment naming Maglott as an unindicted co-conspirator and charging a series of misapplications against Deutsch and Williams which occurred from March of 1961 through July of 1963.

Defendants moved for a hearing on the issue of delay and asked that the case be dismissed since the delay had rendered them unable to reconstruct the complicated transactions charged in the indictment, had lulled them into forgetfulness and had the effect of preventing them from preserving evidence which may have aided them in formulating their defense. The Seventh Circuit sustained the refusal to grant them a hearing and the denial of their motion to dismiss on the basis that the defendants did not show prejudice by reason of the delay.

Until this case the Seventh Circuit has recognized the speedy trial principal (under the name of "due process") as being applicable to prejudicial pre-indictment delay. See *U. S.* v. *Panczko,* 367 F. 2d 737 (CA 7, 1966); *U. S.* v. *Deloney,* 389 F. 2d 324 (CA 7, 1968); *U. S.* v. *Jones,* 403 F. 2d 499 (CA 7, 1968); *U. S.* v. *Napue,* 401 F. 2d 107 (CA 7, 1968); *U. S.* v. *Haggerty,* 419 F. 2d 1003 (CA 7, 1969); *U. S.* v. *Lee,* 413 F. 2d 910 (CA 7, 1969).

In the last of these cited cases *(U. S.* v. *Lee, supra)* the opinion written by one of the judges (Kiley) on the panel below indicated that the longer the delay in indictment, the less burden upon defendants in proof of prejudice:

> "Defendant's motion claimed essentially that the eighteen months delay in indicting her rendered her unable to reconstruct events of March 10, 1965, the day of the alleged offense, or to obtain witnesses who could assist her in doing so. On its face this allegation might normally be enough to put the government to the burden of showing that the delay was reasonable. The

longer the delay, the less burden on defendant in proof of prejudice. See *Woody* v. *United States,* 370 F. 2d 214, 220-23 (D.C.Cir. 1966) (dissent)."

In the instant case, where the delay was apparently at the maximum level, the court below still insisted that the defendants had not sustained the burden of proving prejudice (though not even a hearing on the subject was held) and found that the government did not have to explain the reason for this inordinate delay. It is interesting to note that, not only did defendants complain of their own inability to sufficiently recall what had taken place from 5 to 8 years prior to indictment, but they pointed to time after time where the government's only witness, Estley Maglott, had important memory lapses.

The opinion below however ignored the apparent disadvantages to defendants caused by the delay and stated that "the principal claim of prejudice . . . . stems from purported difficulty in reconstructing the details of the July 30, 1963, events which forestalled the bar of limitations." This difficulty however, was only one significant example of the ineptitude of the record below and should by no means have been construed as defendants' principal claim of prejudice.

The Court below further significantly observed that "the evidence of guilt, including voluminous documents and uncontradictory oral testimony by the participating bank officer, was overwhelming." It would have been more accurate for the opinion to describe the evidence of guilt to have consisted of bare records of bank loans connected by the half recalled and inaccurate testimony of an already convicted conspirator. Although some of Maglott's testimony was proven defective, it is true that many of the things he said remain uncontradicted. There will always be un-

contradicted evidence of guilt, where the government reduces a defendant's chances of correction, rebuttal and contradiction through the natural erosion caused by the unsuspecting passage of time.

Much more significant than the loss of material witnesses and documents invaluable to a defense, is the inability to recollect facts sufficient even to formulate a defense. In a delay of this magnitude prejudice approaching such disability must be presumed, and without valid governmental reason for such delay the court must protect the defendants from the apparent inequalities which may thus result.

Again referring to Mr. Justice Brennan's concurring opinion in *Dickey* v. *Florida, supra,* the following statements analyze the issues here involved and call for some guide lines in defining the Sixth Amendment guarantee for a speedy trial:

> "In my view there are two groups of issues to be met in interpreting the right: first, those concerned when during the criminal process the speedy trial guarantee attaches, and second, those concerned with the criteria by which to judge the constitutionality of the delays to which the right does attach."
>
> "The passage of time by itself, moreover, may dangerously reduce his capacity to counter the prosecution's charges. Witnesses and physical evidence may be lost; the defendant may be unable to obtain witnesses and physical evidence yet available. His own memory and the memories of his witnesses may fade. Some defenses, such as insanity, are likely to become more difficult to sustain; as one court has stated, '[p]assage of time makes proof of any fact more difficult.' "

As to the question of when during the criminal process the right attached Mr. Justice Brennan observes:

"A criminal prosecution has many stages, and delay may occur during or between any of them. It may take place at the beginning of the process: between the time at which the government decides to prosecute a man and has sufficient evidence to proceed against him and the actual time of his arrest or indictment.

The Constitution says that an 'accused' is entitled to speedy trial 'in all criminal prosecutions.' Can it be that one becomes an 'accused' only after he is indicted, or that the Sixth Amendment subdivides 'prosecution' into various stages, granting the right to speedy trial in some and withholding it in others? In related contexts involving other clauses of the Sixth Amendment, we have held that the 'prosecution' of an 'accused' can begin before his indictment; for example, in Escobedo v. Illinois, 378 US 478, 490, 12 L Ed 2d 977, 986, 84 S Ct 1758 (1964), we spoke of the time when 'investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect.'

Deliberate governmental delay designed to harm the accused, however, constitutes abuse of the criminal process. It lessens the deterrent value of any conviction obtained. And it very probably reduces the capacity of the accused to defend himself; unlike the prosecution, he may remain unaware that charges are pending and thus fail to take steps necessary to his defense. Accordingly, some of the interests protected by the Speedy Trial Clause can be threatened by delay prior to arrest or indictment. Thus, it may be that for the purposes of the Clause to be fully realized, it must apply to any delay in the criminal process which occurs after the government decides to prosecute and has sufficient evidence for arrest or indictment."

Mr. Justice Brennan then turns to the question of "reasonableness" with respect to the period of delay:

"It appears that consideration must be given to at least three basic factors in judging the reasonableness

of a particular delay: the source of the delay, the reasons for it, and whether the delay prejudiced interests protected by the Speedy Trial Clause.

When is governmental delay reasonable? Clearly, a deliberate attempt by the government to use delay to harm the accused, or governmental delay that is 'purposeful or oppressive' is unjustifiable. See United States v. Provoo, supra; Pollard v. United States, supra. The same may be true of any governmental delay that is unnecessary, whether intentional or negligent in origin. A negligent failure by the government to ensure speedy trial is virtually as damaging to the interests protected by the right as a purposeful failure; when negligence is the cause, the only interest necessarily unaffected is our common concern to prevent deliberate misuse of the criminal process by public officials. Thus the crucial question in determining the legitimacy of governmental delay may be whether it might reasonably have been avoided — whether it was unnecessary.

For a trivial objective, almost any delay could be reasonably avoided. Similarly, lengthy delay, even in the interests of realizing an important objective, would be suspect. Perhaps the most important reason for the delay of one criminal prosecution is to permit the prosecution of other criminal cases which have been in process longer than the case delayed. But surely even this objective cannot justify interminable interruption of a prosecution."

Mr. Justice Brennan then turns to the question of prejudice. It was upon this question that the Court below held against the defendants, finding no significant prejudice was obvious after trial. The Court thus placed the burden of proving prejudice on defendants, without even a hearing on the question. Mr. Justice Brennan's comments in this area are extremely significant:

"'* * * it is unlikely that a prosecution must be ended simply because the government has delayed unneces-

sarily, without the agreement of the accused. The courts below, however, are divided in their conclusions regarding prejudice. One court has stated that 'we think that a showing of prejudice is not required when a criminal defendant is asserting a constitutional right under the Sixth Amendment,' United States v. Lustman, 258 F2d 475, 477-478 (CA2d Cir. 1958); some have held that prejudice may be assumed after lengthy delays, e.g., Hedgepeth v. United States, 364 F2d 684, 687 and n. 3 (CA DC Cir. 1966). Others have insisted that its existence be shown by the defendant, e.g., United States v. Jackson, 369 F2d 936, 939 (CA4th Cir. 1966), some courts shifting the burden of proof to the government after long delay, e.g., Williams v. United States, 250 F2d 19, 21-22 (CA DC Cir. 1957).

Although prejudice seems to be an essential element of speedy trial violations, it does not follow that prejudice — or its absence, if the burden of proof is on the government — can be satisfactorily shown in most cases. Certainly, as the present case indicates, it can be established in some instances. But concrete evidence of prejudice is often not at hand. Even if it is possible to show that witnesses and documents, once present, are now unavailable, proving their materiality is more difficult. And it borders on the impossible to measure the cost of delay in terms of the dimmed memories of the parties and available witnesses. As was stated in Ross v. United States, 349 F2d 210, 215 (CA DC Cir. 1965): '[The defendant's] failure of memory and his inability to reconstruct what he did not remember virtually precluded his showing in what respects his defense might have been more successful if the delay had been shorter. . . . In a very real sense, the extent to which he was prejudiced by the government's delay is evidenced by the difficulty he encountered in establishing with particularity the elements of that prejudice.'

Despite the difficulties of proving, or disproving, actual harm in most cases, it seems that inherent in

prosecutorial delay is 'potential substantial prejudice,' United States v. Wade, 388 US 218, 227, 18 L Ed 2d 1149, 1157, 87 S Ct 1926 (1967), to the interests protected by the Speedy Trial Clause. The speedy trial safeguard is premised upon the reality that fundamental unfairness is likely in overlong prosecutions. We said in Ewell, supra, at 120, 15 L Ed 2d at 630, that the guarantee of a speedy trial 'is an important safeguard . . . to limit the possibilities that long delay will impair the ability of an accused to defend himself,' and Judge Frankel of the District Court for the Southern District of New York has stated that 'prejudice may fairly be assumed simply because everyone knows that memories fade, evidence is lost,' . . . United States v. Mann, 291 F Supp 268, 271 (1968).

Within the context of Sixth Amendment rights, the defendant generally does not have to show that he was prejudiced by the denial of counsel, confrontation, public trial, an impartial jury, knowledge of the charges against him, trial in the district where the crime was committed, or compulsory process.

Because potential substantial prejudice inheres in the denial of any of these safeguards, prejudice is usually assumed when any of them is shown to have been denied. Because concrete evidence that their denial caused the defendant substantial prejudice is often unavailable, prejudice *must* be assumed, or constitutional rights will be denied without remedy. Prejudice is an issue, as a rule, only if the government wishes to argue harmless error. See Chapman v. California, 386 US 18, 17 L Ed 2d 705, 87 S Ct 824, 24 ALR3d 1065 (1967). When the Sixth Amendment right to speedy trial is at stake, it may be equally realistic and necessary to assume prejudice once the accused shows that he was denied a rapid prosecution.

Thus, it may be that an accused makes out a prima facie case of denial of speedy trial by showing that his prosecution was delayed beyond the point at which a probability of prejudice arose and that he was not

> responsible for the delay, and by alleging that the government might reasonably have avoided it. Arguably the burden should then shift to the government to establish, if possible, that the delay was necessary, by showing that the reason for it was of sufficient importance to justify the time lost."

The reasons a Writ should be granted in this case are found in the concluding remarks of Justice Brennan's opinion:

> "These comments provide no definitive answers. I make them only to indicate that many — if not most — of the basic questions about the scope and context of the speedy trial guarantee remain to be resolved. Arguments of some force can be made that the guarantee attaches as soon as the government decides to prosecute and has sufficient evidence for arrest or indictment; . . . that governmental delay which might reasonably have been avoided is unjustifiable, and that prejudice ceases to be an issue in speedy trial cases once the delay has been sufficiently long to raise a probability of substantial prejudice. Insofar as these arguments are meritorious, they suggest that the speedy trial guarantee should receive a more hospitable interpretation than it has yet been accorded."

II.

The Supreme Court of the United States Must Again Speak Out in Its Supervisory Capacity to Define the Requirements of Overt Acts in a Conspiracy which Serves to Extend the Limitations Period From the Date of Those Acts.

The second, but equally important issue, which relates to the question of delay in this indictment, is the question of whether or not the last alleged overt acts were sufficient to in fact delay the statute of limitations.

A Writ should be granted on this issue alone to review the question of whether the Statute of Limitations with

respect to a conspiracy can be delayed to the detriment of defendants by reason of the unauthorized acts of the unindicted co-conspirator contrary to the express agreement among the parties named as co-conspirators.

Judge Hand spoke about this problem in *United States* v. *Crimmins*, 123 F.2d 271 (2nd Cir. 1941). He said that although,

> " . . . each conspirator is chargeable with the acts of his fellows done in furtherance of the joint venture; (the) . . . acts so imputed must be in execution of the venture as all understand it; not indeed in its details but so far as concerns those terms which constitute the substantive crime. *It is never permissible to enlarge the scope of the conspiracy itself by proving that some of the conspirators, unknown to the rest, have done what was beyond the reasonable intendment of the common understanding . . .* " (Emphasis added)

This court has clearly stated the law applicable to this point in *Grunewald* v. *U. S.*, 353 U.S. 391, 414 (1957):

> "It was incumbent upon the Government to prove that the conspiracy, as contemplated in the agreement as finally formulated, was still in existence . . . . and that at least one overt act in furtherance of the conspiracy was performed after that date. . . . Hence, the crucial question in determining whether the statute of limitations has run is the scope of the conspiratorial agreement for it is that which determines both the duration of the conspiracy, and whether the act relied on as an overt act may properly be regarded as in furtherance of the conspiracy.
>
> "For overt acts in a prosecution . . . are meaningful only if they are within the scope of the conspiratorial agreement. If that agreement did not expressly or impliedly contemplate that the conspiracy would — then the scope of the agreement cannot be broadened retroactively."

The court below has ignored the Supreme Court's pronouncement in *Grunewald* by merely deciding, without any factual analysis whatsoever, that the overt acts of July 30, tolled the statute. By thus holding, the Seventh Circuit has in effect stated that any activity by any co-conspirator regardless of its cause and effect will serve to extend the limitations period.

The facts surrounding the acts of July 30, 1963 were simply these. Maglott, the bank officer, held presigned blank checks on the defendants' bank account (The Wildee account) which were to be used by Maglott *only* to make defendants' loan payments. He in fact held these checks so that they could be used to no other purpose. On July 27, 1963 Maglott needed money for some purpose he could not recall and he wrote one of the Wildee checks to "cash" in the amount of $2,200.00, without the knowledge or consent (express or implied) of defendants. It was expressly against the rules for those funds to be used for any purpose other than for the repayment of defendants' loans. (App. 68, 148-149).

This $2,200.00 check overdrew the Wildee account, and there is no evidence that defendants were ever aware of this overdraft. On July 30, 1963, Maglott caused a loan to be made to John Spellman, an employee of Bert Williams real estate management company, again without any proof of knowledge or consent of the defendants. In fact Spellers testified that neither Deutsch nor Williams knew anything about this transaction. (App. 200-203). The proceeds of the Spellers loan were returned to Maglott and he in turn used them to cover the overdraft he had previously caused in the Wildee account.

These July 30, 1963 events were relied upon by the government to maintain their indictment of July 25, 1968

within the Statute of Limitations. The Trial Court's conviction was sustained by the Seventh Circuit in what must be one of the least analytic opinions ever written upon a question most requiring serious analysis of the definition, scope and duration of the conspiracy.

It has been fourteen years since this Court has spoken on the requirements of proof with respect to the definition of an overt act sufficient to cause an extension of the limitations period of a conspiracy (*Grunewald* v. *U. S.*, 353 U.S. 391, 414 (1957). The exercise by this Court of its supervisory authority is clearly needed again in this area, and this case contains a clear statement of this issue.

CONCLUSION

For the foregoing reasons, we respectfully pray that this Court issue its Writ of Certiorari to review the judgment of the Court of Appeals for the Seventh Circuit in this case.

Respectfully submitted,

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APPENDIX A

IN THE

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM AND SESSION, 1970

No. 17719

UNITED STATES OF AMERICA,

Plaintiff-Appellee.

VS.

RICHARD J. DEUTSCH and BERT WILLIAMS,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division

January 13, 1971

Before KILEY, PELL and STEVENS, *Circuit Judges.*

STEVENS, *Circuit Judge:* Appellants were convicted of conspiring with an officer of the National Bank of Hyde Park to misapply bank funds and credits in violation of 18 U.S.C. § 656. The indictment, returned on July 25, 1968, charged that overt acts pursuant to the conspiracy had been committed on July 30, 1963, forestalling the bar of limitations by five days. 18 U.S.C. § 3282.

Appellants contend that the July 30, 1963, transaction was not in furtherance of the conspiracy and hence the statute had run; alternatively, that the unexplained delay

in returning the indictment prejudiced their defense and requires that the conviction be set aside. There is no merit to either contention.

The conspiracy was effectuated by a series of loans made for the benefit of appellants on the basis of fraudulent applications.[1] One Spellman, an employee of appellant Williams, was a participant in five[2] of these loan transactions either as a payee or an endorser of the proceeds check, or as the maker of a subsequent check transferring the proceeds (less $100 for the apparent purpose of compensating him for his furtherance of the enterprise) to the bank officer who in turn usually, though not always, then reduced appellants' pre-existing indebtedness. The evidence clearly brands Spellman as a co-conspirator. When he borrowed $2,350 pursuant to a fictitious auto loan application, and, on July 30, 1963, delivered his personal check for $2,250 to the bank officer who had previously been covering appellants' delinquencies, he acted in furtherance of the conspiracy. At least it certainly was not error for the learned trial judge, who heard the case without a jury, so to interpret the evidence. *Cf., Blumenthal* v. *United States,* 332 U.S. 539, 556-558.

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[1] In July, 1961, the bank made a loan of $60,000 to an entity owned by appellants, and provided them with collateral for a loan for $27,000 from one Eager. The proceeds of a series of installment loans made thereafter to fictitious or misdescribed payees, pursuant to applications which misstated the purposes of the loans, were primarily applied against the July, 1961, indebtedness, as well as against another $27,000 loan made by Eager in July, 1962, and later delinquencies in the installment loans.

[2] Appellants appear to contend that one of these five loans was legitimate because 20% of the proceeds ($500) was actually used for the purpose stated in the loan application.

Appellants' alternative argument is no stronger. The evidence of guilt, including voluminous documents and uncontradicted oral testimony by the participating bank officer, was overwhelming. The principal claim of prejudice resulting from the delay in prosecution stems from purported difficulty in reconstructing the details of the July 30, 1963, events which forestalled the bar of limitations. But if the indictment had been returned a few weeks earlier, there would have been no need for the Government to prove the July transaction because the events of May and June, 1963, would then have been within the five-year period.[3] The only consequence of the Government's delay was to provide appellants with a colorable defense of limitations that would not otherwise have been available to them.

As we are not persuaded that appellants were prejudiced, the Government had no duty to explain the delay in returning the indictment. *United States* v. *Haggerty,* 419 F.2d 1003, 1007 (7th Cir. 1969), *cert. denied* 397 U.S. 1064; *United States* v. *Lee,* 413 F.2d 910, 913 (7th Cir. 1969), *cert. denied* 396 U.S. 1022.

The judgment is affirmed.

A true Copy:
Teste:

.....
Clerk of the United States Court of Appeals for the Seventh Circuit.

[3] We find no merit in appellant's subsidiary argument that none of the loans subsequent to July, 1962, was within the scope of the conspiratorial agreement.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

Wednesday, January 13, 1971

Before

HON. ROGER J. KILEY, *Circuit Judge*
HON. WILBUR F. PELL, JR., *Circuit Judge*
HON. JOHN PAUL STEVENS, *Circuit Judge*

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 17719 vs.

RICHARD J. DEUTSCH and BERT WILLIAMS,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, in accordance with the opinion of this Court filed this day.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

Tuesday, March 23, 1971

Before

HON. ROGER J. KILEY, *Circuit Judge*
HON. WILBUR F. PELL, JR., *Circuit Judge*
HON. JOHN PAUL STEVENS, *Circuit Judge*

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 17719 vs.

RICHARD J. DEUTSCH and BERT WILLIAMS,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division

On consideration of the petition for rehearing and suggestion that it be heard *en banc* filed in the above-entitled cause, no judge in active service having requested a vote thereon, nor any judge voted to grant the suggestion, and all members of the panel having voted to deny a rehearing,

IT IS ORDERED that the petition for a rehearing in the above-entitled cause be and the same is hereby denied.

APPENDIX

APPENDIX D

SUPREME COURT OF THE UNITED STATES

No. ....., October Term, 1970

RICHARD J. DEUTSCH and BERT WILLIAMS,

Petitioners,

v.

UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon Consideration of the application of counsel for petitioner(s),

It Is Ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including May 13, 1971.

Thurgood Marshall

Associate Justice of the Supreme Court of the United States

Dated this 6th
day of April, 1971.

[redacted]

SUPREME COURT, U. S.

No. 10-159

[redacted]

In the Supreme Court of the United States

October Term, 1911

[redacted]

Richard J. Thomson & Dept. Williams, petitioners,

v.

United States of America.

[redacted]

[redacted]

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-159

RICHARD J. DEUTSCH & BERT WILLIAMS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

Following a non-jury trial in the district court for the Northern District of Illinois, petitioners were convicted of conspiring with Estley Maglott (named as co-conspirator but not indicted)[1] to misapply fraudulently the funds of the National Bank of Hyde Park in violation of 18 U.S.C. 656. Petitioners were each sentenced to 18 months' imprisonment and fined $5,000 plus costs of the prosecution (App. 3, 38).[2] The court of appeals affirmed (Pet. App. A).

[1] Maglott had previously pleaded guilty in 1965 to embezzling, misapplying and misappropriating bank funds (App. 59). He was the sole government witness in the instant trial.

[2] "App." refers to the petitioners' appendix in the court below, a copy of which is on file in this Court.

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1. The indictment, charging a conspiracy beginning about March 1, 1961 (App. 5), and continuing until July 30, 1963, was returned on July 25, 1968, five days before the running of the statute of limitations (App. 1).

The evidence at trial revealed that in the early part of 1961, Maglott, who was Assistant Vice-President of the Bank in charge of the installment loan department, was attempting to sell 31 junior mortgages which he had purchased for the Bank in June 1960. At that time, national banks were not permitted to hold second mortgages as collateral, and Maglott was told by the bank examiners to sell the mortgages (App. 60–61). During March or April of 1961, Maglott asked petitioner Deutsch to assist him in finding a purchaser for the mortgages. In early July 1961, Maglott suggested that Deutsch purchase the mortgages himself. Deutsch was to arrange with Harry Eager of the Illinois Mortgage Company to use the mortgages as collateral to secure a $20,000 loan for a down payment. Maglott also suggested that petitioners Deutsch and Williams form a company in order to obtain a $60,000 loan from the Bank to pay off the balance of the cost of the mortgages (App. 64–65).

On July 21, 1961, at a meeting which took place at the Bank, Eager gave Deutsch a $27,000 loan. A bill of sale was signed, transferring the mortgages to Deutsch, who then assigned them to Eager as collateral for the note. On the following day, petitioners met Maglott at the Bank and the $60,000 Bank loan was negotiated to Wildee Investment Company, the company formed by petitioners to purchase the mortgages (App. 67). A

checking account was opened for Wildee at the Bank and it was agreed that the check book and pre-signed checks would be left with Maglott, who would pay the $60,000 Bank loan and the $27,000 Eager loan from the payments made on the 31 junior mortgages (App. 67–68).

A string of fictitious home improvement loans were made by the Bank, through Maglott, to petitioners in order to meet the payments on the note to Illinois Mortgage Company.[3] The source of these payments was disguised by exchanges of checks (App. 68–76). Subsequently, a number of fictitious automobile loans were also made at the Bank (App. 77–79, 81–87). Part of the proceeds from these loans was used to make payments on other loans involved in this case and part was deposited in the Wildee account as payments on the junior mortgages (App. 79, 81–84, 155–156).

The addresses for the fictitious automobile loans were supplied by petitioner Williams. The proceeds from the first such loan was given either to John Spellers, an employee of Williams' real estate management company, or to Williams, who passed the proceeds on to Spellers (App. 76, 78–79). Spellers was subsequently involved in other fictitious automobile loans, always receiving about $100 for his services in exchanging checks (App. 81–84, 93).

On July 27, 1963, Maglott, using a check pre-signed by petitioners, withdrew $2,200 from the Wildee

[3] At one point (December 4, 1962), a withdrawal from the Wildee account was apparently used to meet payments on these "home improvement" loans (App. 88–89).

checking account (App. 93). At trial, he did not recall what this particular check had been used for (App. 184–185). Subsequently, the Bank auditor called Maglott and informed him that the Wildee account was overdrawn (App. 93). Maglott assured him that there would be a credit coming in the next day (App. 94). Maglott then called either petitioner Williams or Spellers. Spellers came to the Bank and an automobile loan was negotiated in his name. After an exchange of checks, $2,250 was deposited in the Wildee account on July 30, 1963, making the account again solvent (App. 94).

2. Petitioners contend essentially that the transactions on July 27 and July 30, 1963, were made without their knowledge and were not in furtherance of the conspiracy. Accordingly, they argue that the five-year statute of limitations had run with respect to any conspiratorial acts which could be charged to them when the indictment was returned on July 25, 1968. The proof at trial, however, justified the inference that the transactions of July 1963, which were typical means by which the conspirators covered their illegal activity, were in furtherance of the conspiracy.

The conspiracy was maintained through continued cooperation of Maglott and petitioners. When the loan accounts became delinquent, Maglott's role in the conspiracy was to cover up the fraudulent activity. At first, he used fictitious home improvement loans to petitioners. Later, he used fictitious automobile loans. Williams supplied addresses for loans and Williams or his employee, Spellers, participated in the necessary exchanges of checks. It is clear, more generally,

that Maglott, as the insider at the bank, impliedly, and necessarily, was given great leeway in manipulating accounts to cover the various delinquent loans and that the conspiracy contemplated that he have a fairly free hand in such dealings.[4] Cf. *United States* v. *Fellabaum,* 408 F. 2d 220, 224 (C.A. 7), certiorari denied, 396 U.S. 858. In these circumstances, it was proper for the trial court to conclude that the transactions of July 1963 were a part of the conspiracy.

3. Petitioners also assert that the pre-indictment delay in this case denied them their Sixth Amendment right to a speedy trial. In an affidavit in support of a pre-trial motion to dismiss the indictment, petitioner Deutsch stated, *inter alia,* that supporting books, records, and files had become lost or misplaced as the result of a burglary in 1963, a theft in 1965, a loss of certain records by an attorney handling a civil matter, and the natural disposal of old records of the various companies involved in the loans; and that, as a result of the delay, the defendants had been lulled into forgetfulness (App. 11–13). The motion was denied without a hearing. At trial neither petitioner testified.

The record does not show that the delay was the result of oppressive conduct on the part of the government. It was not until 1965, approximately two years after the commission of the last overt acts alleged, that Maglott, the central figure and the only person

[4] For example, neither petitioner Deutsch nor petitioner Williams ever made any payments on the "home improvement" loans (App. 91), and, as noted above, *supra,* n. 3, money from the Wildee accounts was, at one point, used to make payments on these loans.

who knew with whom he dealt and the purposes of these various loans, was apprehended (App. 96). While it is true that at Maglott's sentencing in 1965 the prosecutor stated that Maglott had talked to him and indicated his willingness to assist future prosecution, it was not until sometime between March 1966 and the end of that year—after Maglott was released from prison—that he discussed the general circumstances surrounding this case with a government official (App. 98). Petitioners were not discussed even then. The instant case was first specifically discussed by Maglott just six months prior to trial (App. 119–120).

Nor was the delay in this case prejudicial. The bulk of Maglott's trial testimony was based on bank records (App. 68–71, 73–75, 77–78, 80–83, 85–87, 93) which were equally available to the defense. Such records not only retain their reliability but also could have been used to refresh memories and to instigate investigations into the circumstances surrounding the various loans. Cf. *Tynan* v. *United States*, 376 F. 2d 761, 763 (C.A. D.C.), certiorari denied, 389 U.S. 845.

The court, moreover, did not abuse its discretion in denying a hearing on petitioners' motion to dismiss the indictment, and in proceeding to trial. Petitioners asserted they were unable, in any event, to reconstruct the events at issue. It was therefore proper for the court to determine whether there had been prejudice from the delay or whether it was purposeful on the part of the government on the basis of the evidence which would be developed at the trial, rather than to

hold a separate hearing which would duplicate much of that evidence.

We note, however, that the question whether an indictment may be dismissed because of preindictment delay is before this Court in *United States* v. *Marion and Cratch*,* No. 70–19, jurisdiction postponed to hearing on the merits, March 1, 1971 (401 U.S. 934). Accordingly, the Court may wish to defer disposition of the petition in this case, pending a decision in *Marion and Cratch*.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

JULY 1971.

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* We are supplying counsel for petitioners with a copy of our brief in that case.